80-1450

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NO. 80-

in the
Supreme Court
of the
United States

October Term, 1980

KIRK WILLIAM McLEAN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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QUESTION PRESENTED

WHETHER, CONSISTENT WITH THE FOURTH AMENDMENT, A LAW ENFORCEMENT OFFICER MAY SEIZE PERSONAL LUGGAGE FOR THE PURPOSE OF EFFECTUATING A LINE-UP INSPECTION OF THE LUGGAGE BY A NARCOTICS DETECTION CANINE, IN THE ABSENCE OF A REASONABLE AND ARTICULABLE SUSPICION FOR DOING SO, AFTER THE LUGGAGE HAS BEEN TURNED OVER TO COMMERCIAL AIRLINE PERSONNEL FOR TRANSPORTATION.

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KIRK WILLIAM McLEAN,

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STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

CITATION TO THE OPINION BELOW

The decision of the District Court of Appeal of Florida, Second District, has not yet been reported. *McLean v. State*, _____ So.2d _____ (Fla. 2d DCA) (Opinion filed December 24, 1980). (A.1).[1]

JURISDICTION

The Judgment of the District Court of Appeal of Florida, Second District, was entered on December 24, 1980, affirming *Per Curiam* without opinion the Trial Court's denial of Petitioner's Motion to Suppress. (A.1). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The case, *sub judice*, involves Petitioner's rights to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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[1]The symbol "A." refers to the Appendix attached hereto.

STATEMENT OF THE CASE

On September 12, 1979, the State of Florida charged Petitioner by Information with the offenses of possession of cannabis and cannabis sativa resin, and with trafficking in cocaine. (R.11-12).[2]

Prior to trial, a Motion to Suppress was filed on behalf of Petitioner. This Motion alleged, *inter alia*, that the evidence sought to be introduced at Petitioner's trial was seized from Petitioner in violation of rights guaranteed to him by the Fourth Amendment to the Constitution of the United States. (R.25-29). The Motion to Suppress Evidence was heard on February 28, 1980, in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida. (R.92).

Testimony adduced during the hearing on the Motion to Suppress revealed that on August 16, 1979, Detective Michael E. Connell of the Tampa Police Department Vice Control Bureau was monitoring pedestrian traffic in the Tampa International Airport, at or near the National Airlines ticket counter. (A.2, R.94-95).

At approximately 4:45 P.M., Detective Connell observed Petitioner hurriedly enter the airport terminal. Petitioner approached the ticket counter carrying one piece of luggage. (A.2, R.95). The detective testified that he decided to continue his surveillance because Petitioner was in a hurry and because he carried a

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[2]The symbol "R." refers to the Record and Transcript of Proceedings below.

small amount of luggage " . . . which seemed to be inconsistent with the possible length of his journey." (A.3, R.95; A.8-9, R.106-107).[3]

As Petitioner engaged in conversation with a ticket agent, Detective Connell observed that Petitioner was very talkative and "somewhat tense and rigid." (A.3, R.95). Detective Connell also noticed that Petitioner's hand trembled when the agent gave him his ticket. (A.3, R.96; A.9, R.111).

Petitioner then "checked" his piece of luggage and hurriedly exited the terminal in an apparent attempt to return a rental car. (A.4, R.96; A.9-10, R.111). At this point, Detective Connell learned that the destination of Petitioner's suitcase, as indicated by a tag attached thereto, was Los Angeles, California (see fn. 3, *supra*.). (R.96).

Detective Connell testified that by this time he suspected that Petitioner was a narcotics courier. As a result, he contacted Detective Russell of the Hillsborough County Sheriff's Office via police radio and requested his assistance. (A.4, R.96-97). Connell instructed Detective Russell to " . . . use his narcotics-trained dog to sniff the area around the suspected suitcase, and to reply back to [him] with [the] results. . . ." (A.4, R.97; A.10, R.111-112).

Although Detective Connell was not present at the inspection of Petitioner's baggage *sub judice*, Connell

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[3]Apparently at this point Detective Connell assumed that Petitioner was traveling to California because he had approached the National Airlines ticket counter at a time when most passengers were checking in for a flight to Los Angeles. (R.95, 106-107).

had seen the inspection procedure utilized by Detective Russell (and his dog) on previous occasions. Connell testified that the usual procedure was for Detective Russell to place the suspect bag and two or three "dummy" bags "in an area" on their sides (*i.e.*, horizontally). The bags are spaced out so that there is an equal distance between them. The dog is then brought in and directed by Detective Russell to examine each bag, including the suspect bag. (A.13-14, R.130).

After Detective Connell had contacted Detective Russell, and while Petitioner continued his efforts to return the rental car, Connell went to Concourse "E" to await Petitioner's return to the terminal. (A.4, R.97). While waiting there, Detective Russell advised Connell, via police radio, that his narcotics-detecting dog had alerted positively to Petitioner's suitcase. Russell advised Detective Connell of the possible presence of some type of controlled substance within the suitcase. (A.4, R.97).

Shortly thereafter, Petitioner returned to the terminal and proceeded to his scheduled departure gate. Detective Connell then approached Petitioner and began walking with him. Connell produced his police identification and requested Petitioner's permission to speak with him. (A.4-5, R.97). Petitioner complied with Connell's subsequent request to view his airline ticket and driver's license, which disclosed that Petitioner's ticket was purchased under a name other than his own. (A.5, R.97-98).

Detective Connell did not return either the ticket or license to Petitioner. Rather, he laid both on a counter

adjacent to where he and Petitioner stood. (A. 11-12, R.114, 115-116). Connell then told Petitioner that a dog trained in the detection of narcotics had alerted to his luggage and asked Petitioner whether his suitcase contained any narcotics. (A.5-6, R.98; A.12-13, R.116). Petitioner responded affirmatively to the detective's inquiry and further stated in response to a subsequent question that he had one and one-half pounds of marijuana in his suitcase. (R.98, 116).

Petitioner was then told to accompany the officer to the baggage area so that the suspect suitcase could be retrieved. (A.6, R.98). Once at the baggage claim area, Petitioner was formally arrested and advised of his constitutional rights. (R.122).

Petitioner and his unopened luggage were then transported to the Tampa Police Department Vice Control Office. (R.100). Eventually, Petitioner executed a "Consent to Search and Waiver of Search Warrant" form for his luggage. (R.102). The examination of the contents of Petitioner's suitcase revealed the presence of approximately twenty-eight (28) grams of cocaine, one and one-half pounds of marijuana, and one ounce of hashish. (R.183-184).

The Trial Court denied Petitioner's Motion to Suppress Evidence (A.14-15, R.157-158), following which the Court accepted Petitioner's plea of *Nolo Contendere* with leave to appeal the denial of the Motion to Suppress. (R.82, 188, 193). The parties agreed that the issues raised in the Motion to Suppress were dispositive of the case. (R.189).

On May 12, 1980, Petitioner was adjudicated guilty and sentenced to five (5) years concurrent imprisonment for each of the three counts. The sentence included a three-year minimum mandatory term of incarceration with respect to the charge of "Trafficking in Cocaine", pursuant to §893.135(1)(b)(1), Florida Statutes (1979). Petitioner was also fined Fifty Thousand Dollars ($50,000.00). (R.83). On December 24, 1980, the District Court of Appeal of Florida, Second District, rendered its decision affirming the Trial Court. (A.1).

REASONS FOR GRANTING THE WRIT

After Petitioner had deposited his luggage with a commercial airline at a major metropolitan airport, an officer of the Hillsborough County Sheriff's Department seized Petitioner's suitcase in order to effectuate an inspection by a canine trained in narcotics detection. Petitioner contends that this warrantless seizure was not based on any articulable facts creating reasonable suspicion, much less probable cause, to believe that the suitcase contained contraband. The seizure of said luggage was therefore unreasonable and unlawful under the Fourth Amendment to the United States Constitution. Petitioner submits that the fruits of the unlawful seizure, that is, the subsequent detection of narcotics by the specially trained canine, could not be validly used as a basis to stop, detain, seize, or arrest Petitioner as he walked through the Tampa International Airport.

Unless redressed by the granting of this Petition for Writ of Cetiorari, Petitioner will suffer irreparable violations of rights guaranteed to him by the Fourth

and Fourteenth Amendments. *See, Stone v. Powell*, 428 U.S. 465 (1976).

Petitioner initially concedes that *if all the facts* known to the officer who implemented the investigatory seizure of Defendant's person were lawfully acquired, then such officer did have "reasonable suspicion" for his actions under *Terry v. Ohio*, 392 U.S. 1 (1968), *Brown v. Texas*, 443 U.S. 47 (1979), and *Reid v. Georgia*, _____ U.S. _____, 100 S.Ct. 2395 (1980). The facts which formed the basis for the officer's conclusion that Petitioner was a narcotics courier can be summarized as follows: (1) Petitioner was in a hurry; (2) Petitioner was traveling a long distance, yet carried only one suitcase; (3) Petitioner appeared somewhat nervous; and (4) a canine trained in narcotics detection had alerted positively to Petitioner's suitcase.

Petitioner contends that the most important and incriminating fact enumerated above, that is, the detection of narcotics by the canine, was tainted by the unlawful warrantless seizure of his suitcase. Therefore, this evidence could not validly be used as a basis for stopping and seizing the Petitioner under *Wong Sun v. United States*, 371 U.S. 471 (1963), and its progeny.

Petitioner's research has revealed only one case which squarely addresses the issue of whether luggage seized by government agents at an airport, after being turned over to an airline by the owner, is within the purview of the Fourth Amendment. In *United States v. Goldstein*, 635 F.2d 356 (5th Cir. 1981), luggage checked by the defendants was subjected to an examination by two DEA agents (and their police dog) because the defendants displayed certain profile characteristics of

a drug courier. The canine reacted positively and as a consequence the defendants were stopped and arrested.

Initially, the Court in *Goldstein* recognized that:

> . . . reasonable suspicion is necessary to justify an investigatory stop and that an individual's manifestation of certain *drug courier profile* characteristics, without more, *does not constitute reasonable suspicion. Reid v. Georgia*, _ U.S. _, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980) (per curiam); *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979); *cert. denied*, _ U.S. _, 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980) (two justices dissenting).
>
> 635 F.2d at ____ (slip opinion at 3067). [emphasis added] [footnote omitted.]

The Court went on to conclude that the canine's reaction, which evidenced the presence of drugs, when taken together with the other facts (*i.e.*, "courier characteristics") was sufficient to supply the requisite probable cause to arrest the defendants. *Goldstein*, 635 F.2d at _____ (slip opinion at 3068).

With regard to the agents' initial seizure of the luggage, the Court in *Goldstein* stated:

> . . . the agents' initial removal of appellants' luggage from the National Airlines baggage cart did not violate the constitutional rights of Kern and Goldstein. Our review of the record reveals that the DEA agents were in the semi-public baggage area with the permission of

> National. Once Kern and Goldstein released their luggage to the custody of the airlines, they could no longer control who actually handled their bags. We hold that, because the DEA agents' placement of the two bags in a position to be sniffed did not violate appellants' privacy interests in the contents of their bags, their actions in doing so did not constitute an unreasonable seizure within the meaning of the Fourth Amendment. *See United States v. Klein, supra*, 626 F.2d at 26; *United States v. Burns, supra*, 624 F.2d at 101; *see also, United States v. Venema, supra*, 563 F.2d at 1006.
>
> 635 F.2d at _____ (slip opinion at 3067).

For reasons set forth below, Petitioner respectfully submits that the holding in *Goldstein* is without support in the law.

This Court has emphatically recognized that ". . . luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 2592 (1979) citing *United States v. Chadwick*, 433 U.S. 1, 13 (1977).

Petitioner contends that the inspection of his suitcase *sub judice* was protected by a substantive Fourth Amendment right. Petitioner had a *legitimate and reasonable expectation of privacy* regarding the contents of his luggage. He also had a reasonable and legitimate right to expect that, under these facts, his luggage would not be seized, placed in what is clearly analagous to a "line-up", and then subjected to an inspection by a

canine specially trained in the detection of narcotics. *Cf., United States v. Salvucci*, ___ U.S. ___, 100 S.Ct. 2547 (1980); *Rawlings v. Kentucky*, ___ U.S. ___, 100 S.Ct. 2556 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978); *Katz v. United States*, 389 U.S. 347 (1967); see also, *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (where the Court cited *Ex parte Jackson*, 96 U.S. 727 (1878) in holding that inspection of first-class mail is subject to the constraints of the Fourth Amendment).

Although Petitioner agrees with the Court in *Goldstein* that once luggage is released to the custody of the airlines, the owners can " . . . no longer control who actually handle[s] their bags", 635 F.2d at _____ (slip opinion at 3067), this is *not* to say that such luggage is abandoned and that the owner no longer expects freedom from unwarranted governmental interference with his personal effects. Petitioner respectfully submits that an expectation of privacy to be free from seizures such as that *sub judice* is one that society is prepared to recognize as "reasonable". *See, Katz v. United States, supra.*

The instant case involves a seizure following a search unlike the usual airport search which society expects and to which it has become accustomed. Such airport searches are usually intended to detect weapons that might be used in airplane hijackings. Examples include the regular screening of all flight passengers by magnetometers and the examination of all carryon luggage. Moreover, the public is usually given notice of these types of inspections by signs that are conspicuously posted.

On the other hand, seizures of non-carryon baggage for the purpose of effectuating inspections by canines are not routine insofar as the public is concerned. Nor is there notice of such seizures and inspections posted at passenger check-in points. In short, seizures such as that *sub judice* clearly cannot be justified on an implied consent theory.

Petitioner acknowledges that "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit." *United States v. Mendenhall*, _U.S._, 100 S.Ct. 1870, 1881 (1980) (Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurring in part and concurring in the judgment). Yet, this Court has continually endorsed the principle that intrusions upon privacy rights protected by the Fourth Amendment, although necessary to support valid public interests, are nevertheless subject to the "reasonableness" requirement of the Fourth Amendment. *See e.g., Reid v. Georgia, supra.; Walter v. United States*, __U.S.__, 100 S.Ct. 2395 (1980); *Brown v. Texas, supra.; Arkansas v. Sanders, supra.; Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465 (1979); *Dunaway v. New York*, 442 U.S. 200 (1979); among others. Petitioner contends that this reasonableness standard applies *instanter*.

Petitioner's suitcase was seized and lined up with other "dummy" bags because Petitioner was "suspected" of being a narcotics courier. However, the detective had no more than a bare suspicion that the Petitioner might be involved in criminal activity. Given all the facts and information at the detective's disposal: that Petitioner was nervous and in a hurry, and that he was traveling a long *distance* with only one suitcase, it is

clear that the detective's hunch did not rise to the level of "reasonable", "founded" or "articulable" suspicion at the time he initially seized Petitioner's luggage in order to conduct the canine inspection.

It is reasonable to assume that many people become nervous and apprehensive before they embark on a flight aboard jet aircraft. Furthermore, while there may be a correlation between the amount of luggage needed by a traveler and the *length of time* he spends in another city, there is no reasonable relation between the amount of luggage needed and the *distance* one is flying. Ultimately, the inferences drawn by the detective *sub judice* as a result of his observation of the Petitioner are unwarranted and without a rational basis.

In *Reid v. Georgia*, *supra.*, an investigatory stop of the defendant was made based on the following facts:

> . . . (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were travelling together, and (4) they apparently had no luggage other than their shoulder bags.
>
> 100 S.Ct. at 2753-54.

In holding that the defendant had been unlawfully seized, the Court concluded:

> . . . the agent could not as a matter of law have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances [which] . . . describe a very large category of presumably innocent travellers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.
>
> *Reid*, 100 S.Ct. at 2754.

As in *Reid v. Georgia*, the facts within the officer's knowledge at the time he seized Petitioner's suitcase did not in any way distinguish the Petitioner from the hundreds, even thousands, of people who pass through Tampa International Airport daily. Therefore, such facts did not give rise to any reasonable inferences that criminal activity was afoot, nor specifically that Petitioner was involved in the transportation of drugs. *Cf., Brown v. Texas*, 99 S.Ct. at 2641; *United States v. Ballard*, 573 F.2d 913, 916 (5th Cir. 1978); *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977).

In sum, Petitioner respectfully submits that the detection of contraband by the canine *sub judice*, having occurred during and as a direct consequence of the unlawful seizure of Petitioner's suitcase, was tainted and not a legally sufficient basis to support an investigatory detention under *Terry v. Ohio*, *supra.*, and its progeny. The remaining facts known to the officer, which served as the original basis for the seizure of the suitcase, are without question insufficient to establish a "reasonable suspicion" for that seizure.

Accordingly, the stop, detention, seizure and subsequent arrest of Petitioner were unreasonable and unlawful. *See, Reid v. Georgia, supra.*; *United States v. Rico*, 594 F.2d 320, 326 (2d Cir. 1979); *United States v. Smith*, 574 F.2d 882, 884-85 (6th Cir. 1978); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977); and *United States v. Coleman*, 450 F.Supp. 433 (E.D. Mich. 1978).

CONCLUSION

We respectfully urge the Court, for all of the reasons set forth above, to grant a Writ of Certiorari and to reverse the decision below.

Respectfully submitted,

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Appendix

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IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
SECOND DISTRICT

CASE NO. 80-907

KIRK WILLIAM McLEAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed December 24, 1980.

Appeal from the Circuit Court
for Hillsborough County;
Calvin A. Pope, Judge.

Bob M. Johnson, Tampa,
for Appellant.

Jim Smith, Attorney General,
Tallahassee, and Eula Tuttle
Mason, Assistant Attorney
General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

SCHEB, C.J., and BOARDMAN and GRIMES, JJ., Concur.

RECORD EXCERPTS OF TRANSCRIPT OF PROCEEDINGS BELOW

[R. 94]

Q Detective, would you state your name and occupation?

A Detective Michael E. Connell, Tampa Police Department Vice Control Bureau.

Q Detective, I want to call your attention to the 16th of August of 1979, and more particularly, to an involvement that you had with the defendant in this case, Mr. McLean.

[R. 95]

Would you relate to the Court, in depth, exactly what took place, to the best of your recollection, on that date?

A Yes, sir. On that particular date, I had occasion to be monitoring pedestrian traffic at Tampa International Airport on the second level of the airport terminal, around the National Airline ticket counter.

At that, at this particular time, which was around 4:45, I believe, in the afternoon, I observed the defendant to enter the terminal building in a hurried motion, carrying one piece of luggage, a cordovan-colored piece of luggage, with a padlock-type lock on the zipper. He approached the counter at the time when most passengers at that time would be checking in for a particular flight on National Airlines to Los Angeles, California.

At this time, because of his hurried motion and the small amount of luggage he carried, which seemed to me to be inconsistent with the possible length of his journey, at that point, I decided to continue surveillance on him.

I noticed that when he did approach the ticket counter, he was very talkative, or overly talkative, actually, with the ticket agent. He appeared to be making slight jokes with the ticket agent, and seemed to be somewhat tense and rigid when he was doing so.

MR. JOHNSON: Talk a little more distinct, a little louder. He was tense and rigid. What else?

[R. 96]

THE WITNESS: Tense and rigid.

A (Continuing) At that time I also noticed, after a few minutes of observation, I noticed the way he was transacting this transaction with the ticket agent. At one point, when he reached over with his hand, I noticed his hand was trembling, which indicated a state of nervousness to me.

I overheard the defendant to ask the ticket agent where he would be able to turn in his rental car. I also observed a set of keys in the defendant's hand.

Q (By Mr. Fernandez) Detective, if I may interrupt, how far away were you, more or less, from the defendant about this time?

A I would say no more than thirty feet.

Q Go ahead and continue.

A After the conversation with the ticket agent regarding where the rental car was to be returned and where the defendant would be dropped back off out at the airport again, the defendant hurriedly exited the airport at this particular time.

Also at this time, I had noticed that he had checked his piece of luggage. And I noticed that the destination for it was Los Angeles, indicated by the abbreviation, "LA," indicating last airport.

At that time, I contacted Detective Russell of the Hillsborough County Sheriff's Office, via police radio I had,

[R. 97]

requested his assistance to use his narcotics-trained dog to sniff the area around the suspected suitcase, and to reply back to me with results of that.

I then proceeded up to airside "E," where I knew the defendant would eventually have to return to, to make his flight. In the interim time, while I was waiting there, near airside "E," at which time the defendant returned, I was advised, via a police radio, by Detective Russell, that his dog had alerted positively to the suspected suitcase, indicating to Detective Russell the possible, the presence of some type of controlled substance within the suitcase.

After awhile, later, the defendant finally arrived. He passed through the security checkpoint at airside

"E." At that time I approached the defendant, began walking with him, produced my identification, identified myself to the defendant, requested permission to speak with him. He granted me permission. At that time I then asked him if I could examine his airlines' ticket, which he complied with. He handed me his airlines' ticket. I noticed that the ticket was in the name of Fred Younger, for that particular flight to Los Angeles. I asked him if his name was Fred Younger? He told me at that time that it was. I then asked if I could see some form of identification. He reached back in his pocket. At that point he hesitated, apparently, asked me what this was all about. His voice was quivering somewhat at

[R. 98]

this time. I then advised him of the dog's alert to his suitcase, and the possibility that there was some type of controlled substance within it. He then produced the identification, Florida driver's license, in the name of Kirk McLean. I discussed the discrepancy with his name and the name on the ticket. I believe he asked me if that was illegal. I advised him it's not illegal, but that is not what I was interested in. I then asked him if he had any narcotics in his suitcase? There was a little discussion there, at that point, about how much I was looking for. How much I was interested in? I did make a comment to him that I was not, that there would be, not be an arrest made if there was only a small one-ounce bag of marijuana. That is not what we were interested in. We were interested in larger quantities. The dog is a very sensitive, you know, to the odor of this. It could possibly be alerted to a small amount. I asked him if he did have any narcotics in the suitcase.

He said, "Yes, sir." I asked him how much he had? He said, "I have about a pound and a half of marijuana." I then asked him to accompany me down to the baggage area where we could retrieve his bag.

* * *

[R. 102]

Q (By Mr. Fernandez) Detective, how long have you been in the police force?

A Approximately six years.

Q How long have you been working the special airport

[R. 103]

detail?

A Approximately eighteen months.

* * *

Q (By Mr. Fernandez) What do you know about the dog, Cinder?

A I know that the dog is trained and handled by Detective Jim Russell, Hillsborough County Sheriff's Department. That Detective Russell has had the dog, I believe, somewhat over six years. The dog is trained for scent detection of certain narcotics, or controlled

substances, such as marijuana, hashish and cocaine. And that the dog is

[R. 104]

continually trained by Detective Russell, and is used continually out there at the airport by us.

Q Since you have been out there for a good length of time, during that time, have you ever had occasion to use the dog as the dog was used in this particular case?

A Yes, sir.

Q About how many times have you used that dog, or been around when that dog has "sniffed," or "scented" on a case at the airport?

A It's been numerous times; more than twenty. More than twenty.

MR. JOHNSON: I'm sorry. I couldn't hear your answer?

THE WITNESS: Numerous times; more than twenty.

Q (By Mr. Fernandez) As far as you know, in these cases, how many times has the dog misscented, as opposed to the times that the dog has actually sniffed positively, made a find, and subsequently either via consent or search warrant, you have acquired knowledge that, in fact, the dog was correct? Do you have any idea of a ratio, off the top of your head?

A Only the times I can recall witnessing, myself. And every time I have recalled observing the dog to alert to a suspected piece of luggage, that, eventually, we did find at least some type of controlled substance that the dog is

[R. 105]

trained for within those particular pieces of luggage. I have never seen the dog not make a legitimate find out there.

* * *

[R. 106]

Q What else did you notice about him?

A I noticed he was carrying one piece of luggage at that point.

Q Anything different about that than a lot of other people?

A The size of the luggage. At that time, he was coming in —

Q What was the size of the luggage that made it different from what other people carry?

A Appeared to be smaller than medium size.

Q Is there anything wrong with the person if he carries smaller luggage?

A No.

Q Would you connect that for us in some way?

A Yes, sir. Like I say, at this particular time,

[R. 107]

people were checking into a particular flight to Los Angeles, California. That small piece of luggage seemed inconsistent with the length of journey being made at that time.

Q As a matter of fact, after you got it, didn't you find he had more luggage?

A He had some carry-on he was bringing on the plane with him.

* * *

[R. 111]

Q All right. Now, the only thing you observed of this man was, he was in a hurry, he come up to the counter — on this deposition here — he come up to the counter, you said his voice was a little bit excited, telling about a joke about a watermelon in the State of Florida, his right hand trembled slightly as he picked up his ticket there at the counter, he had car keys in the hand, he was talking about where to take his rental car, is that correct?

A Yes.

Q He then departed?

A Yes.

Q That is what brought your suspicion to the fact

[R. 112]

this was a narcotic courier?

A Yes, sir.

Q All right. Then you went right immediately into action, and what did you do next?

A I requested a Detective Russell to have his dog examine the area around the suitcase.

* * *

[R. 114]

A I told him I was a narcotics detective, we had a narcotics-trained dog that had been alerted to his suitcase.

Q And you suspected him at that time of being a narcotics pusher or courier, is that correct?

A Yes, sir, I did.

* * *

Q You stopped him there at the counter?

A I didn't stop him. He stopped. We walked over to the counter where it would be convenient.

Q Why did he stop?

A I don't know. Ask him.

[R. 115]

Q Oh. He just decided to stop, himself. Where was the airline ticket at this time?

A I believe I laid it down on the counter after I had looked at it. I laid it down on the counter.

Q You didn't give it back to him?

A It was within his reach.

Q I didn't ask you that. Please answer the question.

A I don't recall giving it back to him, no.

* * *

Q All right. You laid it on the counter. At this time, you also had his identification?

A After he finally gave it to me, I did.

Q What was this identification?

A His identification was the name of Kirk McLean.

Q What was the identification? Identification card, driver's license?

A Florida driver's license.

Q Florida driver's license. Did you give that back to him at that time?

[R. 116]

A I believe I also laid that on the counter.

Q Laid that on the counter? Then what did you do?

A That is when I asked, that is when I started conversation with him about whether he had any narcotics or not.

Q Did you ask him, did he have any narcotics? What was his answer?

A He said, "Yes, sir."

* * *

Q You advised him you were a narc; you suspected him of being a narcotics courier?

A I didn't, I advised him the dog had been alerted to his luggage.

Q You told him the dog had been alerted, and you asked him if he had any narcotics?

A Yes.

* * *

[R. 130]

Q Well, that is what I wanted to get at. You don't know how this dog is trained and what he is trained to smell in any way, do you?

A From what Detective Russell had advised me.

Q All you know is hearsay, what someone else told you?

A From what Detective Russell told me.

Q Told you. Have you ever been back and seen this dog in actual operation at the airport?

A Yes, sir.

Q And would you explain the procedure, exactly how that goes on? What you saw?

A Generally, the suspect bag and two to three dummy bags are placed in an area with an equal distance from each other. The dog is then brought in. The dog is directed by Detective Russell to examine each bag, including the suspected bag.

Q Let me ask you this. Were these set right straight up, turned over on their side, or what?

A I believe they are usually, they usually work with them turned over.

Q Turned over on their side?

A Yes.

* * *

[R. 131]

Q All right. You think this dog, in any way, if someone come in there, was in a hurry to come into the airport, they are running late, looks like they are getting ready to load this luggage on the belt moving along, this dog could pick it on the belt?

A I don't know. We don't work it that way.

* * *

[R. 157]

THE COURT: But in this case, the officer's testimony is that he told him that he had a right to have him get a search warrant and that is what he was planning to do. And that's one of the things that is commented on in several cases. So, I am going to, on the record that we have here, I will not make any further comment. I will deny the motion to suppress.

The two areas of concern, I believe, are whether or not there was a legitimate stop — I find this is a legitimate stop, only because of the participation of the dog, which I construe to be in the nature of the, a confidential informer, that the officer had before he ever interrogated, and before he ever specifically asked him any questions about, "Do you have narcotics on you?"

[R. 158]

We are not talking about the confession. That is a different situation. We will take it up at another time if you want to. So, I find that there was enough there for the stop.

FILED
MAY 7 1981
ALEXANDER L. STEVAS,
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1450

KIRK WILLIAM McLEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL SECOND DISTRICT, STATE OF FLORIDA

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QUESTION PRESENTED

WHETHER, CONSISTENT WITH THE FOURTH AMENDMENT, A LAW ENFORCEMENT OFFICER MAY SEIZE PERSONAL LUGGAGE FOR THE PURPOSE OF EFFECTUATING A LINE-UP INSPECTION OF THE LUGGAGE BY A NARCOTICS DETECTION CANINE, IN THE ABSENCE OF A REASONABLE AND ARTICULABLE SUSPICION FOR DOING SO, AFTER THE LUGGAGE HAS BEEN TURNED OVER TO COMMERCIAL AIRLINE PERSONNEL FOR TRANSPORTATION.

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BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

OPINION BELOW

The opinion of the District Court of Appeal, Second District, State of Florida, as reported at 392 So.2d 1384 correctly appears in appendix "A" of the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

Respondent does not question the jurisdictional statement as stated in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

REASONS FOR DENYING CERTIORARI

Petitioner does not contend that the search of his luggage violated the Fourth Amendment. Nor can he, because as he states in his brief (Petitioner's Brief, p. 6) he executed a "Consent to Search and Waiver of Search Warrant."

Petitioner's complaint is that the "seizure" of his luggage, after he had "checked" it in at the terminal with the airlines, for the purpose of having the dog sniff the luggage, tainted any reasonable suspicion that the officer had for the subsequent search of the suitcase.

In essence, Petitioner seeks to have the Court expand the concepts of

United States v. Chadwick, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 422 U. S. 753 (1979) to the extent that one would have an inevitable expectation of privacy not only as to the contents of his luggage but also as to the outer perimeter of the container. It is beyond imagination that this Court would hold that one has an expectation of privacy in the outside of a container which he not only has exposed to the public but has voluntarily turned over to the possession of another.

Petitioner recognizes that the holding of the Fifth Circuit in *United States v. Goldstein*, 635 F.2d 356 (5th Cir. 1981) is squarely against him. Without citing any case in support of his contentions, he suggests that

". . . the holding in *Goldstein* is without support in law" (Petitioner's Brief, p.10). Consequently, it is manifest that the decision of the court below does not conflict with any decision of this Honorable Court or of a Circuit Court of Appeals.

Furthermore, since the lower court did not write an opinion, it is impossible to determine whether it based its decision on the fact that Petitioner had no reasonable expectation of privacy as to the luggage itself or whether it based its decision on the conclusion that any illegality in the "seizure" of the luggage was purged in consenting to a search of its contents.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Respondent, and a member of the Bar of the United States Supreme Court, hereby certify that on the _____ day of May, 1981, I served three copies of the Brief in Opposition to Petition for Writ of Certiorari on Joel Hirschhorn, Esquire, 742 Northwest 12th Avenue, Miami, Florida 33136, by a duly addressed envelope with postage prepaid.

CHARLES CORCES, JR.
Assistant Attorney General